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Interstate Water Dispute and Federalism: Governance of Interstate River Water in India

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Abstract

Interstate water dispute stands at the juncture of two fields of law: federalism under constitutional law, and water law. Because India is a federal democracy, and because rivers cross state boundaries, constructing efficient and equitable mechanisms for allocating river flows has long been an imperative legal and constitutional subject. The provisions of the Constitution relating to interstate water dispute give a good instance of co-operative federalism. In India water is primarily falls under State list, except in case of interstate rivers where the Central government can intervene. However, powers of the river board created under *River Boards Act, 1956* only have advisory powers. There have been instances where States have refused to accept the decision of tribunals rendering the arbitration not binding, which makes the Indian water dispute settlement mechanisms further ambiguous and opaque. The paper examines the methods and policies used before independence to tackle the problem of interstate river water dispute. The paper highlights a need for quick movement to arbitration or adjudication in case of a conflict. The paper presents some recommendations, including the setting up of an independent federated institution to adjudicate and negotiate between the parties to the dispute within a fixed time period.

Keywords: Interstate, River, Constitution, Federalism, Adjudication

Introduction

Water is a major resource for sustaining life on earth. Water contributes to welfare in several ways: health, agriculture, industry, etc. This extraordinary demand for water in diverse fields has resulted in its scarcity. Moreover, availability of water is highly uneven in both space and time as it is dependent upon varying seasons of rainfall and capacity of storage.

India is served by two great river systems, *i. e.*, the Great Himalayan Drainage system and the Peninsular River network. It has 14 major rivers that are inter-state rivers and 44 medium rivers of which 9 are inter-State rivers. For the reason that India is a federal democratic system, and because rivers cross state boundaries, constructing proficient and equitable mechanisms for allocating river flows has long been a significant legal and constitutional question. Many inter-state river-water disputes have erupted since independence.

On the face of it, inter-state water disputes involve issues of:

- (i) Allocation of waters between different states;
- (ii) Apportionment of construction costs and benefits if a project is developed jointly by more than one state;
- (iii) Compensation to the states prejudicially affected by the implementation of a project by another state;
- (iv) Dispute settlement relating to interpretation of agreements and;
- (v) Excess withdrawals by a state.

Constitutional History, Relevant Provisions and Other Legislations

Until the Government of India Act of 1919, all irrigation works except those not exceeding Rs 10 lakhs in

cost were under the control of the Central Government, and subject to the sanction of the Secretary of State. The GOI Act 1919, made irrigation a provincial subject, while matters of inter-provincial concern or affecting the relations of a province with any other territory were subject to legislation by the central legislature. The GOI Act of 1935 drew attention explicitly to river disputes between one province and another or between a province in British India and a federated Indian state. The provincial legislative list included “*water, that is to say water supplies, irrigation and canals, drainage and embankments, water storage and water power.*”

Sections 130 to 134 of the Government of India Act, 1935 laid down that a province or a princely state could complain to the Governor General if its interests were prejudicially affected in the water supplies from a natural source, due to the action of another province or princely state. If the Governor General was of the opinion that the issues involved were of ample importance, he was required to appoint a commission to investigate the matter and to report to him. After considering the report he was to give a decision he deemed proper.

In the draft constitution the original provisions on the subject, viz., Articles 239 to 242 were drafted on the same lines as sections 130 to 134 of the Government of India Act, 1935. However, a subsequent amendment replaced these provisions and Article 262 was added.

The relevant provisions in the present Indian Constitution are:

- Entry 17 in the State List,
- Entry 56 in the Union List, and
- Article 262.

Entry 17 makes water a state subject, but qualified by Entry 56 in the Union List, which empowers Union regarding the regulation and development of inter-state rivers and river valleys to the extent to which such control of the Union is declared by parliament by law to be expedient in the public interest. In addition to this, Article 262 explicitly grants right to legislate to parliament over the matters in Entry 56, and also gives it primacy over the Supreme Court. Various River Authorities have been proposed, but not legislated or established as bodies vested with powers of management. Instead, river boards with only advisory powers have been created.

Article 262 states:

- (1) Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-state river or river valley.
- (2) Notwithstanding anything in this Constitution, Parliament may by law provide that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in clause (1).

Parliament has enacted two laws under the above provisions:

- 1) River Boards Act of 1956- This Act was made for setting up of river boards by the central government at the request of the interested parties.
- 2) Inter-State Water Disputes Act of 1956 – Under this Act, in case of a dispute, the affected State is empowered to request the Central government to refer disputes relating to the use, distribution, or control of Inter-State river waters for adjudication by tribunal constituted under the Act. In addition to this, if

the Central Government feels that the water dispute referred to it cannot be settled by negotiations, then it can refer the dispute for adjudication by a tribunal constituted under the Act. The tribunal shall then investigate the complaint and forward a report to the Central government known as order or award of the tribunal. Within three months of the report, the Central Government or any of the State Government concerned can approach the tribunal for clarification. The Central Government shall publish the tribunal's decision in the official gazette, and then the decision will be final and binding on the parties to the dispute. Neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any water dispute referred to a tribunal.

Besides this, National Water Policy of 1987 also dealt with distribution of water amongst the states. Water being a State subject, it is necessary that the initiative and responsibility for development of inter-state rivers and river valleys should primarily rest on the State government. Experience, has, however, shown that the river valley projects have been considerably hampered in the past by the conflict of interests among different state governments. While it is necessary to ensure that the powers of State governments in relation to inter-state rivers and river valleys remain unaffected, it is also necessary to make suitable provision for resolving conflict among the State governments and for achieving maximum results in respect of conservation, control and optimum utilization of water resources of inter-state rivers.

India's Experience

The negotiation through agreements has been one of the paramount ways to solve inter-state river water disputes in India. Over 130 agreements have been evolved on the sharing of Inter-State river waters or on specific projects. Since most of the river basins of India are Inter-State in character, the Central Organizations viz., the Planning Commission and the Ministry of Water Resources with its technical attached organization, the Central Water Commission, have exercised a very well set schedule of techno-economic clearance guidelines in approving the Inter-State projects planned by the States for implementation under the five year plans. This procedure has been institutionalized, even though it is time consuming. There is a loophole in this, since the clearance is required only if the State wants Central Plan funding for the project. Otherwise, the State can go ahead with the project if funds are not a constraint. In that case, the aggrieved States can seek judicial intervention to stop the project.

THE KRISHNA RIVER WATER DISPUTE

The Krishna River begins in the Western Ghats, a mountain range that runs north-south along the western coast of India. The river drain parts of three States: Maharashtra (where the river begins); Karnataka (the middle riparian) and Andhra Pradesh (the furthest downstream). The first irrigation projects in the basin were built in 1855, when India was part of the British Empire. As the basin population grew, the States signed water allocation agreements with each other, first in 1892 and again in 1933, 1944 and 1946. In 1951; three of the States signed a new water allocation agreement. But the fourth State, Mysore, refused to ratify the agreement, and the interstate disputes lingered. The 1953 statute creating a new State of Andhra Pradesh and the States Reorganization Act, 1956 changed important boundaries in the Krishna River basin and consolidated a number of States. But disagreements over water continued. Then, in 1969, in answer to a petition from three States, the Central Government invoked the Inter-State Water Disputes Act and created the Krishna Water Disputes Tribunal. Four years later, the Krishna Tribunal issued its award. Additional requests from the States for clarification forced the Tribunal to reexamine certain assumptions and decisions. As a result, it was not until 1976 that the Tribunal published its final award, which contained the following conclusions:

The Tribunal evaluated two alternative solutions, which it called "Scheme A" and "Scheme B."

- Scheme A was based on an apportionment based on the annual availability of 2,060 TMC (thousand million cubic feet) of water in the basin. The Tribunal allocated this

water to the States of Andhra Pradesh, Karnataka and Maharashtra. The Tribunal allocated the surplus to the State of Andhra Pradesh but it did not acquire a permanent (vested) right to those waters.

- *Scheme B*, contemplated the creation of a Krishna Valley Authority, a basin-wide government entity, to allocate water and manage the river, including surplus flows. The State of Andhra Pradesh did not endorse this alternative while Maharashtra and Karnataka did. Because the three States did not collectively agree to create a Krishna Valley Authority, the Tribunal did not adopt *Scheme B*. The Tribunal allowed the States to re-open the water allocations after May 3, 2000.

The subsequent round of adjudication began in 2004 with the formation of a second Krishna River Tribunal. The *Krishna II* Tribunal increased the amount of annual allocable water to 2,578 TMC. But the Tribunal made those additional allocations less dependable than the base allocations in 1976.

Like its precursor, the Tribunal did not explain what happens when there is not adequate water in the river to satisfy demands in drought. The Tribunal called for the creation of a Krishna Water Decision Implementation Board to administer its findings. The Tribunal said the States could re-open the Tribunal's order after May 31, 2050. In the meantime, two of the States, Karnataka and Andhra Pradesh, have filed petitions in the Supreme Court, challenging the award which is pending before the Supreme Court.

THE SARKARIA COMMISSION

The Sarkaria Commission in its report at Chapter XVII on Inter-State River Water Disputes has recommended that:-

- Once an application under Section 3 of the Inter-State River Water Disputes Act is received from a State, it should be mandatory on the Union Government to constitute a Tribunal within a period not exceeding one year from the date of receipt of the application of any disputant State. The Inter-State River Water Disputes Act may be suitably amended for this purpose.
- The Inter-State Water Disputes Act should be amended to empower the Union Government to appoint a Tribunal, *suo-moto*, if necessary, when it is satisfied that such a dispute exists in fact.
- There should be a Data Bank and information system at the national level and adequate machinery should be set up for this purpose at the earliest.
- The Inter-State Water Disputes Act should be amended to ensure that the award of a Tribunal becomes effective within five years from the date of constitution of a Tribunal. If, however, for some reasons, a Tribunal feels that the five years period has to be extended, the Union Government may on a reference made by the Tribunal extend its term.
- The Inter-State Water Disputes Act, 1956 should be amended so that a Tribunal's award has the same force and sanction behind it as an order or decree of the Supreme Court to make a Tribunal's award really binding.

These five recommendations were considered by the erstwhile Sub-Committee of the Inter-State Council. The Sub-Committee accepted four out of five recommendations. The time frame specified for constituting a Tribunal by the Union Govt. was increased from one year to two years. The Inter-State Council Secretariat prepared a consensus paper on the recommendations of Sarkaria Commission, which was deliberated upon during fifth meeting of the Standing Committee of Inter-State council under the chairmanship of the Union Minister of Home Affairs.

The Standing Committee recommended that *"the Tribunal should give its award within a period of three years from the date of its constitution. However, if for unavoidable reasons the award could not be given within a period of three years, the Union Government may extend the period suitably not exceeding two years. The award should be implemented within two years from the date of notification of the award. If for unavoidable reasons the award could not be implemented within a period of two years the Union Government may extend the period suitably."*

Based on the recommendations given by the Inter-State Council on Sarkaria Commission's Recommendation a bill for amending the Inter State Water Disputes Act 1956 was introduced in Lok Sabha on 7.3.2001. The Bill was passed in Lok Sabha on 3.8.2001 and Rajya Sabha on 11.3.2002 and

received the assent of the President on 28.3.2002.

POSITION IN U.S.A.

Although, the U.S. Constitution makes no mention of water but the text, which went into effect in 1789, expressly grants powers to Congress to regulate interstate commerce. In 1800s, U.S. Supreme Court held that interstate commerce included shipping and navigation. In more recent times, the U.S. Supreme Court has held that water sold across state lines implicates the interstate commerce clause; States may therefore not impose unreasonable bans or restrictions on the movement of interstate water. In the United States, the federal government plays a dominant role in the construction and operation of dams, locks, canals and other infrastructure on interstate rivers. The two lead federal agencies are the U.S. Army Corps of Engineers and the U.S. Bureau of Reclamation. Because of the extensive investment in dams, locks and irrigation canals, virtually all *intrastate* rivers in the United States have been “*federalized*”. The issue of who gets what from the rivers remains a State issue. The States are the ones who issue permits for water diversions, and their procedures differ significantly between States. The distribution of water to retail consumers is typically the responsibility of local governments, counties, cities and towns that have their own water utilities.

INTERLINKING OF RIVERS IN INDIA: REALITY OR MYTH

The Indian Rivers Inter-link is a large-scale civil engineering project that aims to join the majority of India's rivers by canals and so reduce persistent water shortages in parts of India. In December 2002, the Supreme Court ordered to take up the task of interlinking major rivers of the country. The National Water Development Agency has, after carrying out detailed studies, identified 30 links for the preparation of feasibility reports under the National Perspective Plan, 1980. It has prepared feasibility reports of 6 such links.

Criticism: Critics of the Inter-link scheme have alleged that the environmental impact of these projects would be extreme. Diverting water from so many rivers would have a serious impact on the mangroves of the coastal regions and hence on fish stocks, that extra irrigation will cause salt levels to rise and that the project will take precious, and disputed, water from Bangladesh causing India international problems. Critics also point to the enormous costs conservatively estimated at some \$115bn USD which India can ill afford. It has also been suggested that the program is a vast vote-buying exercise on the part of sections of the Indian political establishment. A Bench comprising Chief Justice S H Kapadia and Justices K S Radhakrishnan and Swatanter Kumar has asked Central Government, “*Whether the project is feasible, if so how and when will it be possible at what cost.*” In more recent news, hearing the same petition Supreme Court has questioned whether the interlinking of rivers would require land acquisition; the Supreme Court said it might not favor the project if it meant a huge financial burden on the government. The fate of this ambitious project proposing linkages between major rivers by the year 2016 has virtually remained a non-starter and the detailed project report is virtually in cold storage.

CONCLUSION

In summary, current Indian water-dispute settlement mechanisms are ambiguous and opaque. In the light of the above discussion, it is ample clear that Centre has failed to provide an effective way to deal with the problem of inter-state river water disputes. Delayed agreement over water has prompted ineffective, non-cooperative investments in dams, irrigation, and agriculture and industry more generally. In India not only the process of agreement is slow, but, effectively, binding arbitration does not exist. The threat point of no agreement has been the outcome in several major disputes (e.g., Cauvery; Ravi- Beas). This can result in inefficient levels of investment by the individual, non-agreeing states, generating a diversion of scarce investment resources, as well as inefficient use of the water itself. This in turn can have negative impacts on economic growth. The problems are compounded by the entanglement of inter-state water disputes with more general Center-State conflicts. These impacts can be reduced by a more efficient design of mechanisms for negotiating inter-state water disputes. An independent federated body should be set up to adjudicate and negotiate between the parties to the dispute within a

fixed time period. Interlinking of rivers might lead to land acquisition, problems relating to culture and ecosystem, creating conflicts between states, as in *Cauvery*, and between state and the people, as in the case of Narmada. Destruction of cultures, communities, and ecosystems, creating conflicts between states, as in *Cauvery*, and between state and people, as in Narmada is quite evident as in *Sardar Sarovar project*. Conflicts are dealt more politically than scientifically. Interstate disputes could take decades to resolve. The canals, designed for carrying irrigation waters rather than large peak flows, will not be sufficient to control or divert floods in the northern states but will transfer silt. Several large dams built to provide the head and storage required to supply the canals will permanently submerge fertile lands, forests, village communities and towns, leaving millions of people displaced or dispossessed. Therefore, Supreme Court is right in questioning centre as to the feasibility and consequences of the project. In nature what is linked are not rivers but water itself, through the hydrological cycle. A balanced water cycle demands a holistic policy that promotes forest cover, prevents erosion, enhances ground water through micro-watershed structures, and provides for desolation and maintenance of existing tanks, lakes and reservoirs. A vigilant judiciary should punish corrupt administrations for non-implementation of environmental regulations, right to life and livelihood.

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